Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

THEOPHILE CARTY,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has already rejected the contention that fraud is implicit in the concept of "evading" for purposes of the federal statute of limitations for tax crimes. Is fraud implicit in the concept of tax evasion, even where there is no deceit, making that crime one of moral turpitude and supporting an order of deportation under the removal provisions of the Immigration and Nationality Act?

This Court has held that, because deportation is a drastic measure, courts will not assume that Congress meant to require deportation beyond that which is required by the narrowest of several possible meanings of the words used. Does this rule of construction apply to state laws that lead to deportation if not construed narrowly?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner below was Theophile Carty. The Respondent below was Alberto Gonzales.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Theophile Carty prays that this Court issue a writ of *certiorari* to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit filed January 19, 2005.

OPINIONS BELOW

The January 19, 2005 Panel Majority Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix ("App.") A at 1a) is reported at 395 F.3d 1081. The March 18, 2003 order of the Board of Immigration Appeals dismissing Carty's appeal from the Immigration Judge's order (App. B at 12a) is unreported. The November 26, 2002 order of the Immigration Judge ordering Carty removed from the United States (App. C at 13a) is unreported.

JURISDICTION

The judgment of the court of appeals was first entered on January 19, 2005. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc, which was denied on April 13, 2005. This timely petition for writ of *certiorari* followed. The Court has jurisdiction in this case pursuant to 28 U.S.C. Section 1254(1).

Although this Court does not have jurisdiction to consider challenges to removal orders brought by aliens who are removable because they committed two crimes of moral turpitude not arising out of a single scheme of criminal misconduct, 8 U.S.C. Section 1252(a)(2)(C), this Court has jurisdiction to examine its own jurisdiction. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 884 (9th Cir. 2003). As part of its jurisdictional inquiry, this Court may examine Carty's contention that he is not an alien removable by reason of having been convicted of two crimes of moral turpitude.

Hernandez-Martinez v. Ashcroft, 329 F.3d 1117, 1118 (9th Cir. 2003). Moreover, if this Court finds that Dr. Carty is not an alien removable by reason of having been convicted of two crimes of moral turpitude, this Court has jurisdiction to vacate the BIA's order of removal. *Huerta-Guevara*, 321 F.3d at 888.

STATUTORY PROVISIONS

This case involves 8 U.S.C. Section 1227(a)(2)(A)(ii) and California Revenue and Taxation Code Section 19406.

STATEMENT OF THE CASE

Dr. Carty immigrated to the United States from the island of Anguilla in April of 1965. Dr. Carty became a lawful permanent resident of the United States on April 1, 1975. Dr. Carty developed a successful medical practice, with three medical clinics and various satellites in the Watts neighbor-

hood of Los Angeles, California, and employed several other physicians.

In August of 1995, the State of California filed an Information against Dr. Carty that charged him with several criminal violations. Dr. Carty pled *nolo contendere* to two of those violations on January 1, 1996; both were for failure to file an income tax return in violation of California Revenue and Taxation Code Section 19406.[1] On May 15, 2001, Dr. Carty pled guilty to attempted bribery of a government official.[2]

On July 12, 2002, the INS filed a Notice to Appear with the Immigration Court, charging that Dr. Carty was subject to removal on the ground of being an alien convicted of two or more crimes involving moral turpitude. The Immigration Judge issued an oral decision on October 24, 2002, ordering Dr. Carty to be removed from the United States to Anguilla. After the Immigration Judge on his own motion reopened the removal proceedings against Dr. Carty for further proceedings, on November 26, 2002, the Immigration Judge reinstated the prior oral decision and order of removal.

On December 18, 2002, Dr. Carty timely appealed the November 26 order to the Board of Immigration Appeals. On March 18, 2003, the BIA affirmed the decision of the Immigration Judge in a per curium decision, and dismissed the appeal.

On March 31, 2003, Dr. Carty filed a timely *pro se* petition for review with the Ninth Circuit, along with a motion to stay deportation. On July 11, 2003, the Ninth Circuit granted the

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[1] The California legislature repealed Section 19406 effective January 1, 1994, and replaced it with the substantially identical Section 19706. *See* Cal. Rev. & Tax. Code §§ 19406; 19706 (Westlaw 2004). The Information charged Dr. Carty with conduct occurring in 1991 and 1992.

[2] Dr. Carty did not raise the issue of whether attempted bribery of a government official is a crime of moral turpitude below, and does not raise it before this Court.

stay of deportation, which remains in effect. On January 19, 2005, a three-judge panel of the Ninth Circuit, over one dissent, dismissed the petition for review for lack of jurisdiction.

The two-judge majority held that "[i]ntent to defraud is implicit in willfully failing to file a tax return with the intent to evade taxes." (App. at 4a-5a). The majority reasoned that false or deceitful conduct is not a necessary element in determining whether a crime involved moral turpitude. (App. at 4a-5a & n.6).

The dissenting judge disagreed, noting that this Court in *Scharton* "expressly rejected the argument[] presented by the government that 'fraud is implicit in the concept of evading . . .'" (App. at 11a) (Canby, J., dissenting). The dissenting judge would have held that "some false or deceitful conduct" is a "necessary characteristic" for a crime to inherently involve fraud, so the mere failure to file an income tax return, even with the intent to evade taxes, does not inherently involve fraud.

REASONS FOR GRANTING THE PETITION

I. THE PANEL MAJORITY CONTRADICTED *SCHARTON* WHEN IT CONCLUDED THAT FRAUD IS IMPLICIT IN THE CONCEPT OF TAX EVASION ABSENT DECEIT.

"[A]n attempt to evade the payment of a tax . . ., unlawful as it is, immoral as it is, is [not] an act evidencing baseness, vileness, or depravity of moral character." *United States v. Carrollo*, 30 F. Supp. 3, 7 (W.D. Mo. 1939). "The number of men who have at some time sought to evade the payment of a tax or some part of a tax to some taxing authority is legion." *Id.* "Any man who does that should be punished civilly or by criminal sentence, but to say that he is base or vile or depraved is to misuse words." *Id.*

Since the *Carrollo* case, courts have established a baseline for crimes that potentially subject the wrongdoer to banishment under the nation's immigration laws: Carty's tax evasion must inherently involve fraud or have fraud as an essential part in order to be a crime of moral turpitude. *Goldeshstein v. INS*, 8 F.3d 645, 646-47 (9th Cir. 1993); *Tseung Chu v. Cornell*, 247 F.2d 929, 934-35 (9th Cir. 1957); *Khan v. Barber*, 253 F.2d 547, 549 (9th Cir. 1958).

This Court has already spoken on whether evasion inherently involves fraud, albeit in a non-immigration context. In *United States v. Scharton*, 295 U.S. 518, 520-22 (1932), Scharton was charged with attempts to evade taxes by falsely understating taxable income. The applicable statute of limitation for offenses "arising under the internal revenue laws of the United States" was three years, with a proviso that "for offenses involving the defrauding or attempting to defraud the United States" the statute was six years. This Court rejected the government's contention that "fraud is implicit in the concept of evading," and held that the proviso did not apply to the offense of tax evasion.

The result in *Scharton* is compelled by the common law elements of fraud. Fraud is defined in California (the place of Carty's wrongdoing) as follows: "One who ***willfully deceives*** another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Cal. Civil Code Section 1709 (emphasis added). Further, fraud requires an act of commission, rather than mere omission. B.E. Witkin, Summary of California Law, Torts, § 697 at 799 (9th ed. 1988) ("Although material facts are known to one party and not the other, ***failure to disclose them is ordinarily not actionable fraud*** unless there is some fiduciary relationship giving rise to a duty to disclose") (emphasis added); *see also Chiarella v. United States*, 445 U.S. 222, 227-28 (1980) ("one who fails to disclose material informa-

tion prior to the consummation of a transaction commits fraud only when he is under a duty to [disclose]").

Indeed, when the BIA first addressed whether failure to file a tax return with the intent to evade taxes was a crime of moral turpitude, the BIA concluded that the answer was "no." *In re Carlos Alas Mazza-Alas*, 15 Immig. Rptr. B1-88 (BIA Oct. 27, 1995)[3]. This conclusion makes sense. Failure to file a return—unlike filing a false return—does not inherently involve deceit, a necessary element of fraud.

Here, Carty was not accused of deceiving California's taxing authorities or engaging in any wrongful act of commission. He was not accused of filing a false or fraudulent tax return, nor was he accused of lying to or misleading the taxing authorities. As Judge Canby explained in his dissent, the Panel Majority did not claim that Carty's crime involved the use of false statements or counterfeit documents, or other false or deceitful conduct. (App. at 10a) (Canby, J., dissenting) (explaining that "some false or deceitful conduct" is a "necessary characteristic" for fraud). Nor did the State of California allege that Carty was the State's fiduciary. Instead, Carty was convicted for a sin of omission: he failed to file a tax return with the intent to evade taxes. In the absence of deceit or a wrongful act of commission, Carty's crime did not inherently involve fraud.

Nevertheless, the Panel Majority below held that "intent to defraud is implicit in willfully failing to file a tax return with the intent to evade taxes" for purposes of the removal provisions of the Immigration and Nationality Act. In so doing,

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[3] While not designated as precedent, so-called index decisions such as *Mazza-Alas* "often address novel or unique immigration law issues before the BIA," and "counsel may cite index decisions for persuasive authority or to illustrate an analogous application of a principle of law." Gordon, Mailman & Yale-Loehr, Immigration Law and Procedure, § 3.24 (Matthew Bender 2004).

the Panel Majority became the only court in the nation to so hold. More important for purposes of this Petition, the Panel Majority failed to heed this Court's rejection, in *Scharton*, of the contention that fraud is necessarily implicit in the concept of "evading."

This Court should grant the writ to address this important question.

II. THE PANEL MAJORITY FAILED TO GIVE THE WORDS OF THE STATE STATUTE THEIR NARROWEST POSSIBLE MEANING, IN CONTRADICTION OF *FONG*.

"[D]eportation is a drastic measure and at times the equivalent of banishment [or] exile." *Fong v. Phelan*, 333 U.S. 6, 10 (1948). "[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Id.* Although *Fong* involved interpretations of federal law, this principle should also apply to interpretations of state law, where state law is a predicate for deportation under federal law. *Cf. United States v. Donahue*, 1993 WL 114031, *8 (E.D. Pa. April 13, 1993) ("The principle of lenity counsels against interpreting [the federal sentencing guidelines] to give the prosecution the benefit of unsettled state law by attaching a more severe penalty classification to a prior [state] offense when a less severe classification is equally applicable" under state law).

In fact, where as here the relevant word in question has not been interpreted by any state court, the federal courts should be even less willing to give the state law a broad interpretation that is unfavorable to the individual.

Because this Court has already rejected the contention that "fraud" is implicit in the concept of "evading," *Scharton*, 285

U.S. at 520-21, reading "evade" to exclude "defraud" is at least one of "several possible meanings" of these words. The Panel Majority should have adopted the *Scharton* Court's narrow reading of these words. Instead, in a circular argument, the Panel Majority appeared to distinguish *Scharton* on the precise ground that this Court gave the words involved a "narrow construction." (App. at 4a & n.5; *see also* App. at 11a (Canby, J., dissenting) ("It is true, as the majority opinion here recites, that *Scharton*'s result depended in part on a strict standard of construction applicable to the extended limitations provision"). But in light of *Fong*, that is precisely why the Panel Majority should have adopted it, not why the Panel Majority should have distinguished it.

This Court should grant the writ to clarify that the rule of construction announced in *Fong* applies to state laws leading to deportation as well as to federal laws leading to deportation.

CONCLUSION

For the foregoing reasons, the Petition should be granted, and the decision below summarily reversed in light of *Scharton* and *Fong*; or the case should be set for plenary briefing and argument on the important question presented herein.

Respectfully submitted,

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May 20, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 03-71392

THEOPHILE CARTY,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

Argued and Submitted Nov. 4, 2004
Filed Jan. 19, 2005

Before: CANBY, JR., RYMER, and HAWKINS, *Circuit Judges*.

MICHAEL DALY HAWKINS, *Circuit Judge*.

We must decide whether "intent to evade" is synonymous with "intent to defraud" within the meaning of the removal provisions of the Immigration and Nationality Act ("INA"). Because we conclude the terms are synonymous, we dismiss the petition for review of Dr. Theophile Carty ("Carty"). Carty, a native of Anguilla, petitioned this court for relief from a Board of Immigration Appeals' ("BIA") decision affirming an Immigration Judge's ("IJ") determination that willful failure to file state income taxes under *California Revenue and Taxation Code* § 19406 (1992) ("Section 19406") is a crime involving moral turpitude, thereby subjecting Carty to removal pursuant to INA § 237(a)(2)(A)(ii) for conviction of two or more crimes involving moral turpitude.

While we generally do not have jurisdiction to consider challenges to removal orders brought by aliens removable pursuant to INA § 237(a)(2)(A)(ii), *see* 8 U.S.C. § 1252(a)(2)(C), we can determine whether we have jurisdiction. *See Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 885 (9th Cir.2003). As part of this jurisdictional inquiry, we may examine whether Section 19406 tax evasion constitutes a crime of moral turpitude. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117, 1118 (9th Cir.2003).

I. BACKGROUND

Carty immigrated to the United States in 1965 and became a lawful permanent resident in 1975. Working as a licensed physician in Los Angeles, Carty made a comfortable and, it turns out, largely unreported income.[1] The State of California charged Carty with the willful failure to file a state income tax return in 1991 and 1992, in violation of Section 19406. Carty pled nolo contendere to both counts, and was sentenced to ninety days house arrest, payment of all past taxes due, and probation for three years. In 2001, Carty pled guilty to attempted bribery of a government official, admitting that he offered money to obtain a U.S. passport for a non-citizen. He was sentenced to eighteen months imprisonment and three years probation.

The INS thereafter commenced removal proceedings against Carty pursuant to INA § 237(a)(2)(A)(ii)[2] for conviction of two or more crimes involving moral turpitude. In the face of Carty's argument that failure to file a tax return is

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[1] The record shows Carty made, on average, $3,000 per week from 1984 to 1996.

[2] INA § 237(a)(2)(A)(ii) states, "Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."

not a crime involving moral turpitude,[3] the IJ ruled that Carty's willful failure to file a return with the intent to evade taxes constitutes a crime involving moral turpitude. The BIA affirmed, specifically concurring with the IJ's moral turpitude determination.

II. DISCUSSION

Whether a state statutory crime necessarily involves moral turpitude is a question of law, subject to de novo review. *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 n. 4 (9th Cir.1995). Crimes of moral turpitude are of basically two types, those involving fraud and those involving grave acts of baseness or depravity. *Rodriguez-Herrera*, 52 F.3d at 240. For analytical purposes, tax evasion falls within the first category.

Section 19406 provided in pertinent part:

> Any person who . . . willfully fails to file any return or to supply any information with intent to evade any tax imposed by this part, or who, willfully and with like intent, makes, renders, signs, or verifies any false or fraudulent return or statement or supplies any false or fraudulent information, is punishable . . . .[4]

Section 19406 is a divisible statute, constituting (1) willful failure to file a return or to supply information with the intent to evade taxes, and (2) willful making of a false or fraudulent return or statement or supplying any false or fraudulent information.

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[3] Carty did not raise the issue of whether attempted bribery of a government official is a crime of moral turpitude below, and does not raise it on appeal.

[4] The California legislature repealed Section 19406 in 1994 and replaced it with a substantially identical Section 19706. *See Cal. Rev. & Tax.Code* § 19706 (2004).

When a statute is divisible into several crimes, some of which may involve moral turpitude and some not, it is appropriate to examine the "record of conviction" to determine which part applies to the defendant. *See Wadman v. INS*, 329 F.2d 812, 814 (9th Cir.1964), *Hernandez-Martinez*, 329 F.3d at 1118-19. Here, Carty was convicted of "willfully and unlawfully fail[ing] to file any return or to supply any information with intent to evade any tax imposed by this part."

To involve moral turpitude, intent to defraud must be an "essential element" of Carty's conviction. *See Goldeshtein*, 8 F.3d 645, 647 (9th Cir.1993). Looking to the language of Section 19406, the willful failure to file section does not specifically list intent to defraud as an element, nor is it alleged in Carty's indictment. However, Section 19406 does list intent to evade taxes as an element, and the government must prove "specific intent to evade a tax" under the substantially identical Section 19706. *See California Jury Instructions, Criminal*, 7th Ed. § 7.66 (2004).[5]

We have held that "[e]ven if intent to defraud is not explicit in the statutory definition, a crime nevertheless may involve moral turpitude if such intent is 'implicit in the nature of the crime.'" *Goldeshtein*, 8 F.3d at 648 (quoting *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir.1978)).[6] Intent to defraud

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[5] Carty argues that intent to evade taxes is not necessarily the same as intent to defraud the government, citing *United States v. Scharton*, 285 U.S. 518, 52 S.Ct. 416, 76 L.Ed. 917 (1932). *Scharton* only held that a statute must explicitly include an intent to defraud for the government to avail itself of the six-year statute of limitations for fraud actions. 285 U.S. at 521-22, 52 S.Ct. 416. The narrow construction applied to statute of limitations issues led to a holding that an income tax statute requiring willful attempt to evade or defeat taxes does not fall within the fraud exception. *Id.*

[6] *Goldeshtein*, in distinguishing *Matter of Flores*, 17 I. & N. Dec. 225 (BIA 1980), and other cases on which the government relied, noted that structuring financial transactions does not involve "some false or deceitful

is implicit in willfully failing to file a tax return with the intent to evade taxes. Unlike *Goldeshtein*, where the court found that willfully structuring transactions did not inherently involve fraud because it only deprived the government of information and did not obtain anything from the government, *id.* at 649, here Carty deprived state government of more than mere information. By willfully failing to file his tax returns, he attempted to deprive the government of revenue--or, in other words, to obtain a free pass on taxes.

The closest analog to Section 19406 is 18 U.S.C. § 145(b) (1939), which prohibits the willful attempt "in any manner to evade or defeat any tax." *See Khan v. Barber*, 147 F.Supp. 771, 775 n. 2 (N.D.Cal.1957), *aff'd, Khan v. Barber*, 253 F.2d 547 (9th Cir.1958). *Khan* held that § 145(b) is a crime of moral turpitude, 253 F.2d at 549, as did *Tseung Chu v. Cornell*, 247 F.2d 929, 934 (9th Cir.1957). Courts had consistently interpreted tax evasion under § 145(b) as requiring "an intent to defraud the government." *Khan*, 253 F.2d at 549. As Tseung Chu explained,

> [T]he Courts have, with apparent unanimity, held that in order for a conviction under § 145(b) to stand, the government is required to prove that the evading taxpayer had a specific intent to evade taxation amounting to an intent to defraud the United States.
>
> Fraud is so inextricably woven into the term willfully, as it is employed in § 145(b), that it is clearly an ingredient of the offense proscribed by that section. Only by creating unwarranted semantic distinctions could a contrary conclusion be reached.

247 F.2d at 933 (quoting *Khan*, 147 F.Supp. at 775). The reasoning of *Khan* and *Tseung Chu*—that fraud is clearly an

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conduct through which the alien obtained something from the government." 8 F.3d at 649. While a useful guideline, *Goldeshtein* did not hold that such false or deceitful conduct was a necessary element in determining whether a crime involved moral turpitude.

ingredient of § 145(b)—applies with equal force to Section 19406's intent to evade requirement.[7] This leads us to determine that intent to evade under Section 19406 is tantamount and equivalent to an intent to defraud for deportation purposes.

Moreover, the terms "evasion" and "fraud" have been treated interchangeably by California and the federal government. In California, the penalty for tax "fraud or intent to evade" is the same. *Cal. Rev. & Tax.Code* § 6485. Similarly, the federal tax fraud penalty statute, while not specifically denoting "intent to evade," requires proof that "the taxpayer has engaged in conduct with the intent to evade taxes that he knew or believed to be owing." *United States v. Walton*, 909 F.2d 915, 926 (9th Cir.1990); 26 U.S.C. § 6653(b).

Just as fraud has been defined to mean intent to evade, intent to evade has generally been held to require proof of fraud.[8]

Federal tax statutes with an "intent to evade" element, and no specific fraud requirement, have still been interpreted as requiring an intent to defraud. *See Tseung Chu*, 247 F.2d at 933 (interpreting 18 U.S.C. § 145(b)); *Windham v. Bd. of Med. Quality Assurance*, 104 Cal.App.3d 461, 469, 163

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[7] Neither the holding in *Tseung Chu*, that "an intent to defraud the government is a prerequisite to conviction under section 145(b) and hence, a conviction thereof where such fraud is charged in the indictment, is conviction of a crime involving moral turpitude," 247 F.2d at 936, nor the identically worded holding in *Khan*, 253 F.2d at 549, suggest that charging fraud in the indictment is the only situation in which moral turpitude may be found. As we said in *Goldeshtein*, another situation in which moral turpitude may be found is when fraud is implicit in the nature of the crime. 8 F.3d at 648.

[8] The willful failure to file section of Section 19406 does not require proof of fraud. *See California Jury Instructions, Criminal*, 7th Ed. § 7.66 (2004) (enumerating elements of substantially identical *Cal. Rev. & Tax.Code* § 19706).

Cal.Rptr. 566 (1980) (interpreting 26 U.S.C. § 7201). Thus, it cannot be said that willful evasion of taxes under Section 19406 does not implicitly involve fraud.

III. CONCLUSION

Having determined that willful failure to file a tax return, with the intent to evade taxes, involves fraud, and thus constitutes a crime of moral turpitude, we dismiss the petition for lack of jurisdiction.

DISMISSED.

CANBY, *Circuit Judge*, dissenting:

As a matter of first impression, I would be willing to accept the majority's position that willful failure to file a tax return with intent to evade a tax is necessarily a crime of moral turpitude. It is not a matter of first impression, however, and in my view our precedent requires a contrary result.

In *Tseung Chu v. Cornell*, 247 F.2d 929 (9th Cir.1957), we addressed the question whether a violation of 26 U.S.C. § 145(b) was a crime of moral turpitude. Section 145(b), as it then existed, proscribed willful attempts to evade a tax. We held that a violation of section 145(b) was a crime of moral turpitude, but we did not arrive at that conclusion from the face of the statute itself or from the mere fact of conviction. We relied on earlier case law holding that proof of fraud was required to sustain a conviction under section 145(b). We then said of Tseung Chu:

> He was here charged with making in each of four years "a false and fraudulent income tax return." Fraud may not be an essential element of the crime of wilful attempt to defeat or evade the income tax, but it can be an essential part of that crime. Here fraud was charged as part and parcel of the crime, and to that crime so involving appellant's alleged fraudulent acts, appellant plead nolo.

Id. at 935 (internal citation omitted). Thus in *Tseung Chu* we relied on a specific allegation of fraud in order to arrive at the conclusion that the crime involved moral turpitude. There was no such allegation in Carty's conviction; he pleaded nolo contendere to two counts alleging only that he "did willfully and unlawfully fail to file any return or to supply any information with intent to evade any tax imposed by this

part."[1] *Tseung Chu's* reasoning makes it clear that such an allegation is not enough to establish moral turpitude.

Indeed, *Tseung Chu* elsewhere makes the point even more specifically than it did in the passage I have quoted above. Anticipating this court's adverse approach, Tseung Chu had managed to have his earlier conviction modified, so that the judgment's description of the charge no longer referred to "false and fraudulent income tax returns," but only to "wilful attempts to evade or defeat an income tax." We responded to that maneuver as follows:

> The "order correcting clerical error in Judgement" eliminating the description of the offense charged as "making false and fraudulent income tax returns" may technically take the *judgment* out of Class One ["crimes necessarily involving moral turpitude"] described by Judge Chambers in the Twentieth Century-Fox Film classifications, but it does not take the *crime as charged* out of Class One.

Id. (emphasis in original). Finally, we summed up our decision as follows

> We follow the rule laid down in the De George case supra, and *Bloch v. United States*, 221 F.2d 786 (9th Cir.1955), that an intent to defraud the government is a prerequisite to conviction under section 145(b) and hence, a conviction thereof where such fraud is charged in the indictment, is conviction of a crime involving moral turpitude.

Id. at 936 (emphasis added).

We reiterated the rationale of *Tseung Chu* in *Khan v. Barber*, 253 F.2d 547 (9th Cir.1958). In that appeal, the first

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[1] As the majority opinion here notes, California does not require proof of fraud for conviction on this charge. Majority opinion, supra, note 8.

question presented was whether a conviction for violating section 145(b) involved moral turpitude. We stated:

> This court has already answered the first question affirmatively where, as here, intent to defraud the government is charged in the indictment and found by the jury.

Id. at 549 (emphasis added). A quotation from *Tseung Chu* immediately followed.

In my view, the rationale of *Tseung Chu*, reaffirmed in *Khan*, is fatally inconsistent with any notion that the bare crime of failing to file a tax return with intent to evade taxes is ipso facto a crime of moral turpitude. If intent to evade were sufficient to establish moral turpitude, there would have been no need for us to examine the indictments in *Tseung Chu* and *Khan* to make certain that they charged fraud. The charges to which Carty pleaded nolo contendere included no such allegation.

We did not diverge from the rationale of *Tseung Chu* in our later decision of *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993), discussed in the majority opinion here. In *Goldeshtein* we held that the crime of structuring financial transactions in order to avoid currency reports was not a crime of moral turpitude. It is true that we based our decision in *Goldeshtein* partly on the ground that nothing had been taken from the government, but we also based our decision on the absence of fraud or deception. We pointed out that all of the cases upon which the government relied involved "*some false or deceitful conduct* through which the alien obtained something from the government." *Id.* at 649 (emphasis added). We then held that Goldeshtein's crime did not share this necessary characteristic for a crime of moral turpitude:

> The offense of structuring financial transactions to avoid currency reports, in contrast, does not involve the use of false statements or counterfeit documents, nor does the defendant obtain anything from the government.

Id. at 649 (emphasis added).

Finally, I note the implications of the Supreme Court's decision in *United States v. Scharton*, 285 U.S. 518, 52 S.Ct. 416, 76 L.Ed. 917 (1932), which held that the longer, six-year statute of limitations for "offenses involving the defrauding or attempting to defraud the United States" did not apply to a conviction for willfully attempting to evade payment of taxes. It is true, as the majority opinion here recites, that Scharton's result depended in part on a strict standard of construction applicable to the extended limitations provision. Nevertheless, *Scharton* expressly rejected the arguments presented by the government that "fraud is implicit in the concept of evading or defeating" and that "[a]ny attempt to defeat or evade a tax is said to be tantamount to and to possess every element of an attempt to defraud the taxing body." *Id.* at 520-21. Although I agree with the majority that *Scharton* is sufficiently distinguishable that it does not directly control the outcome of Carty's case, *Scharton* certainly leans in the same direction as *Tseung Chu*.

For these reasons, I respectfully dissent from the majority's opinion. I would grant the petition for review and reverse the decision of the BIA.

APPENDIX B

DECISION OF THE BOARD OF
IMMIGRATION REVIEW

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Falls Church, Virginia 22041

File: A34-703-092 – ELOY March 18, 2003

In re: *F-CARTY, THEOPHILE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Jerri G. Brewer

ORDER:

PER CURIAM. We affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). We specifically note that we agree with the Immigration Judge's finding that one "who did willfully and unlawfully fail to file any return or to supply any information with intent to evade any tax" has committed an offense involving fraud that constitutes a crime involving moral turpitude (I.J. at 4-5). Accordingly, the appeal is dismissed.

/s/ Frederick D. Mess
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Eloy, Arizona

File No.: A 34 703 092 October 24, 2002

In the Matter of)

THEOPAILE CARTY,)

) IN REMOVAL PROCEEDINGS

Respondent)

CHARGE: Section 237(a)(2)(A)(ii) Immigration and Nationality Act (after admission convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

APPLICATIONS: Termination; in the alternative cancellation of removal as to certain permanent residents.

ON BEHALF OF' THE RESPONDENT: Pro se

ON BEHALF OF THE SERVICE: Geri Brewer, Esquire
Assistant District Counsel
INS, Eloy, AZ District

ORAL DECISION OF THE IMMIGRATION JUDGE

This is a removal proceeding instituted by the Immigration and Naturalization Service against the named respondent when he was served with a Notice To Appear which was filed with the Court. Exhibit 1.

The Service alleged the respondent is not a citizen or national of the United States but is a native of Anguilla and a citizen of the United Kingdom, It's further alleged that the

respondent was admitted to the United States at the Pre-Flight Inspection Area at Toronto, Canada. April 1st, 1975 as a lawful resident, on an immigrant visa. They further allege that on October 1st, 1996, the respondent was convicted in the Superior Court of California, Los Angeles County, for failure to file Income Tax Return in violation of California Revenue Taxation Code, section 19406. Lastly, they allege that on May 14th, 2001, the respondent was convicted in the United States District Court, Central District of California, for attempted bribery of a public official in violation of Title 18, *United States Code*, Section 201(b)(1).

The respondent admitted that he is not a citizen of the United States but ultimately claimed to be a national of the United States. The respondent admitted being a native of Anguilla, but denied being a citizen of the United Kingdom. The remaining allegations, as far as admission to the United States as an immigrant and the two convictions referenced, were admitted by the respondent.

The respondent contested the charge of removability on two grounds: initially, that the conviction of failure to file income tax return in 1996, in California is not a crime involving moral turpitude; and, secondly, claiming that his application for naturalization evidences his claim to be a national of the United States.

The Immigration Service presented to the Court documentary evidence in support of the allegation of admission into the United States as an immigrant, 1996 California conviction, and 2001 U.S. District Court conviction. See Group Exhibit 4, Tabs 1, 2 and 3, respectively.

The respondent acknowledges that the convictions relate to him and are final judgments.[1]

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[1] The respondent avers that the conviction for attempted bribery is under collateral attack but not under direct appeal.

As shown, the Immigration Service presented their brief in support of the charge of removability. Exhibit 4.

The respondent submitted his brief contesting the charge of removability. Exhibit 5.

Additionally, the respondent submitted his claim to nationality in written form (Exhibit 8) and the Service replied to that (Exhibit 9).

The respondent designated Anguilla for removal should that become necessary.

Initially, I note that whether the respondent denies being a citizen of the United Kingdom is not relevant to the claim of alienage by the Immigration Service. Which country the respondent may ultimately be a citizen of, as long as it is not of the United States or that he is not a national of the United States, is not material to the issue of alienage. Ordinarily, when an individual is born outside of the United States, there is a presumption of alienage unless that presumption is rebutted. I've considered the arguments presented by the respondent concerning his claim to nationality. The Court notes that the application for naturalization was not filed until August of 2001, and subsequent to both convictions alleged in the Notice To Appear. I believe that concerning the respondent's claim of nationality, that his arguments fail for the reasons stated by the Immigration Service in their submission (Group Exhibit 9). I do not find the respondent to have rebutted the presumption of alienage, and he has not established that he is a national of the United States through his own actions, as this was not conferred by the United States Government.

As to the respondent's claim that the conviction in California does not constitute a crime involving moral turpitude, see Exhibit 5, I also do not find that to be correct. The conviction documents submitted (Exhibit 4, Tab 2), while listing seven counts, show that the respondent ultimately pled *nolo contendere* to counts 4 and 5, those being failure to file Income Tax

Return in violation of *Revenue and Taxation Code*, 19406, felony convictions, which include the language "who did willfully and unlawfully fail to file any return or to supply any information with intent to evade any tax imposed by this part." The inclusion of this language, in the opinion of the Court, evidences that this is a crime involving moral turpitude, notwithstanding the respondent's contentions to the contrary. As stated earlier on today's date, although there may be more than one statutory section which prescribes a certain conduct, it does not mean that the title of the conviction the respondent had, for failure to file an income tax return does not include the element of intent to evade any tax imposed. The respondent pled nolo contendere to that offense(s).

Aside from the briefs cited, which also include reference to *Matter of Flores*, 17 I&N Dec. 225, *at* 229 (BIA 1980), it references that "willful evasion of taxes and knowingly making false statements with intent to unlawfully obtain issuance of a passport have been considered to be tantamount to fraud on the United States and, therefore, crimes involving moral turpitude." Additionally, the Court notes the Ninth Circuit Court of Appeals decision *Khan v. Barber*, 253 F.2d 547 (1958), indicating that an alien convicted of willfully attempting to evade the payment of federal income tax, and for committing the same offense 12 months later, satisfy the charge that after entry convicted of two crimes involving moral turpitude. *See also* the Ninth Circuit case, *Chu v. Cornell*, 247 F.2d 1929 (9th Cir. 1957) which I believe is also relevant to the issue. After consideration of the cases cited by the respondent, as well as the cases cited by the Immigration Service, including the 10th Circuit Court of Appeals case *Wittgenstein v. INS* (1997), 124 F.3d 1244 and *Costello v. INS*, (2d Cir. 1962), 311 F.2d 343, I'm satisfied that the convictions the respondent had as listed on the Notice To Appear, are both crimes involving moral turpitude and, therefore, he is subject to removal as charged. To the extent the

respondent seeks a termination of these proceedings, that motion is denied.

The Immigration Service acknowledges the respondent is statutory eligible to seek cancellation of removal and an application was received (Exhibit 10). Ultimately, additional materials were also presented on today's date in support of the application (Group Exhibit 11), which include an evaluation by Drs. Jacobs and Piacentini referencing the respondent's son as having obsessive Compulsive Disorder and Turret's Syndrome, as described by the respondent. The supporting letters from Attorney Freedman, Dr. Nelson, and the respondent's former spouse Dr. Richards-Carty, all speak well of the respondent and seem to indicate that the convictions that he has had are out of character as far as their awareness of the respondent.

The Court also, as background information, without objection from either party, submitted a copy of the *World Fact Book* report for 2002 as prepared by the CIA referencing the respondent's homeland of Anguilla. The Court believes this is helpful simply as far as background information. This also might explain the respondent's statements of why he no longer claims to be a citizen of the United Kingdom, notwithstanding the listing on the immigrant visa as being a native of Anguilla but a citizen of the United Kingdom. The *World Fact Book* shows scession by Anguilla from the country of Great Britain in 1971 but it was not formally recognized until 1980 as being separate from Great Britain.

FACTS OF THE CASE:

The respondent is a 56-year-old divorced male with three children that were born in the United States and are living separately from the respondent. The Court notes the hearing is taking place at a detention facility and the respondent is in the custody of the U.S. Bureau of Prisons. One of the children had been living, prior to the respondent's incarceration, with

the respondent, that being Jason, date of birth 9/30/80, because of the assistance the respondent indicates that ha could lend to his son, in addressing the neuropsychological problems that he has and the various obsessive compulsive disorders that he evidences. However, the respondent indicates that while he has met with some success in this regard, that it has not been completely successful and the respondent, when faced with incarceration, put Jason in a facility in Texas, which is an independent living facility, to try to assist Jason with the problems that he faces. The respondent claims that Jason has slipped back somewhat when not under his own care, but there is no documentary evidence in support of this. The mother of the respondent's three children is Dr. Richards-Carty, who lives in Texas but, according to the respondent, that owing to her work, she does not remain in one area or in a stable living situation but moves around Texas with some frequency. The respondent placed Jason at the independent living facility in Texas also because Jason's grandmother lives in Texas and can at least attend to Jason's needs every now and then.

The respondent came to the United States as a visitor in 1965, with the assistance of the respondent's cousin. He then decided to become a student in the United States and attended Howard University attaining a Bachelor of Science in Chemistry. Thereafter, he decided to go into medicine with the hopes of assisting in the needs of his own people in Anguilla, where the respondent indicates trained professionals in medicine are in need. The respondent attended the University of Pennsylvania from 1971 to 1974 and graduated as a medical doctor. He completed his residence in general surgery, also at the University of Pennsylvania and ultimately in 1975, after becoming a lawful resident of the United States moved to California. He continued his medical training at the Martin Luther King Hospital in Los Angeles and, thereafter, continued practicing in the WATTS area of Los Angeles and south central Los Angeles. The respondent was able to establish a

medical practice there. He spoke at some length of the area being under-served by the medical profession and he thought that he could be of assistance. Ultimately, he had three medical clinics and satellites in various locations and other physicians were employed by the respondent. The application the respondent submitted shows the respondent was self-sufficient and, in fact, generated a substantial income while benefiting those in the neighborhoods of WATTS and south central Los Angeles. See Exhibit 10, Part 5, Attachment Item 38, referencing a weekly income of $4,000 between 1979 and 1984 and $3,000 from 1984 to 1996.

Therefore, while the Court does sot doubt the respondent's good intentions, this was not to the suffering of the respondent as a result of focusing his medical practice in those under-served areas.

The other two children, a son and daughter, are adults and living independently of the respondent. The respondent's medical license was revoked and although the respondent seeks to challenge this, he acknowledges that it is not merely suspended but that he is no longer licensed to practice medicine in California. The respondent had spoken of the encounters with authorities in the legal or criminal charges that he had faced and, frankly, the letters that were received today, from the respondent in support of his good character, speaking of being in complete surprise of the respondent's claimed involvement, appear to be contrary to what I heard during the respondent's testimony. While the respondent claims innocence and ignorance of the various activities that had been ongoing within his office and/or under his name, frankly, my opinion is that the respondent, in describing the activities, especially with the attempted bribery, evidences a set of actions where he was not ignorant of what was going on and was not innocent or so naive to make this Court believe that this was an unintentional act as he contends. For the attempted bribery, he contacted, at the behest of a friend Steve,

a former friend, who worked at a U.S. Passport office, Gloria Green. In seeking her assistance, at the behest of Steve, in issuing a passport for yet another individual, who was having problems in obtaining a passport. This was not a simple casual conversation on one occasion that the respondent contacted Me. Green, but this went on over several months and he spoke not only with her but another person introduced by Ms. Green, ultimately turning out to be undercover agent. The respondent seems to be unrepentant and unremorseful in this regard and does not acknowledge any culpability, notwithstanding his pleas to the offense. It's my opinion that the respondent's actions evidence culpability and knowledge. He appears to attempt to impress the Court that others were taking advantage of him in one form or another and. that he had no liability or culpability as to the matters for which he was ultimately convicted. I don't think the evidence supports that contention, notwithstanding the letters of support as to his good character. An example of this is the respondent's acknowledgement of statements that apparently appear on a Presentence Report as read to the respondent wherein he acknowledges making the statement to Gloria Green that she would make the "deal of the millennium" and that this would allow her to retire to the French Riviera". This is not a casual, by the way, could you help out in looking at what the problem is on a particular passport application. I think the respondent knew exactly what he was doing in getting involved with; this went on over several months.

Additionally, the Court finds incredible the respondent's claim that he couldn't file tax returns because all of the records from his office had been impounded by police authorities when they were investigating the charges of being involved with insurance fraud. A person with as much education as the respondent has, who clearly is an intelligent individual, the idea that he could not file tax returns, or did not even know that he could, when he was with legal advice on more than one occasion, is incredible, and I do not find

that it is worthy of belief. Additionally, I do not go behind the records of conviction and the records of conviction indicate, in counts 4 and 5, willful failure to file with intent to evade. This is not innocent.

Therefore, as far as credibility, while the Court finds the respondent credible as to his background and other areas of his testimony concerning property ownership or lack thereof, family relations, history and educational experience, and family members remaining in Anguilla, I do not find his testimony worthy of belief as to the claims of innocence or naivety for the convictions that he has had. In Anguilla, the respondent owns no property and owns no property in the United States. The respondent has never been in the United States military. If allowed to remain in the United States, he indicates that he has job offers or has friends with whom he can work in the import/export business. He also hopes that he could be on the boards or direct or administer programs for battered women and persons involved in drug abuse, that he claims he started to get involved with in the south central Los Angeles area with a church prior to his incarceration. The respondent acknowledges that as far as hardship to himself, there really would not be if he had to leave for Anguilla, other than the uprooting and going to a new country and starting over. The claim of hardship would be as to his son Jason in wanting to assist Jason in trying to gain self-sufficiency.

In Anguilla, the respondent owns no property. The respondent's father continues to live in Anguilla as do two of the respondent's brothers and one sister. The respondent's father has his own home as does one of the respondent's brothers. One brother has a restaurant at an airport in Anguilla and one brother works at a power plant. The respondent's sister has a small boutique there. In the United States, the respondent also has one sister who lives in Ohio and is a lawful resident of the United States. The respondent's mother died in August of 2000 in Anguilla. The respondent is not sure whether his

medical education would be recognized in Anguilla so that he could open a private office but he would have to check into that.

The.respondent states that he has learned he has cancer of the prostate but he has not taken measures to address this yet as he believes surgery may be needed but he wants to get a second opinion. He believes that it is treatable but it depends upon the course of treatment and whether, e.g., there would be remission.

The other family members the respondent has in the United States are of good health with the exception of the disorders noted that Jason has.

THE APPLICATION FOR CANCELLATION:

The Immigration Service acknowledged the respondent's statutory eligibility for the relief. The issue comes to discretion. In this regard, the Court notes the Board's decisions in *Matter of Sotelo*, 23 I&N Dec. 201 (2001); *Matter of C-V-T-*, Int. Dec. 3342 (BIA 1998); and *Matter of Campos-Torres*, Int. Dec. 3428 (BIA 2000). Cancellation application is, in essence, an offspring of the former application under section 212(c) of the Act, and as noted by the Board, the standards previously applicable to 212(C) applications are also applicable to cancellation applications. It is, therefore, a determination of whether the granting of relief appears to be in the best interests of the United States and whether the good factors, in essence, outweigh the negative. Clearly, the respondent's three United States citizen children, the length of time that he has been in the United States as a lawful resident, are all outstanding equities. Outstanding equities, or unusual hardships are not a prerequisite of this application and the Court specifically notes that the respondent has not been convicted of "an aggravated felony". Yet, evidence of rehabilitation is often an important consideration in these applications.

In my opinion, from the respondent's testimony, I don't think he's been rehabilitated because I don't think he acknowledges culpability, notwithstanding his plea of *nolo contendere* to the offenses. As previously discussed, the respondent suggests to the Court that other people took advantage of him and that he had no participation of any kind in these activities other than casual. I don't think his own testimony supports these contentions and, frankly, I am surprised that the respondent would seem to suggest this to the Court. As he fails to acknowledge his culpability and as I think from his statements he has shown to be culpable, I don't think he had been rehabilitated. The Court notes that although the respondent acknowledges having successfully completed probation on the 1996 offense, he again gets involved with criminal activity of attempted bribery of a public official. I don't think the respondent is deserving of the relief. The request for a wavier finder cancellation of removal as to certain permanent residents is, therefore, denied in my discretion.

There is no showing, notwithstanding the respondent's contention that Jason's mother travels about in Texas, that she, as a medical doctor, would be unable to give whatever support the respondent would be able to give to Jason. The respondent's upheaval in being moved back to Anguilla, is his own doing.

Ultimately, when the respondent came to the United States, he indicated that he was wanting to go into medical school and, ultimately, the medical profession, to assist his countrymen in Anguilla. He may be given that opportunity at this point, although it is several decades after he first made this statement of his intent.

The application is denied in my discretion.

ORDER:

IT IS ORDERED that the respondent be removed from the United States to Anguilla on the charge brought against him.

The Court notes the respondent is not eligible for voluntary departure at conclusion of proceedings as he has been serving most recently his 18-month sentence on a conviction for attempted bribery which is a crime involving moral turpitude. The respondent does not appear eligible for other relief such as adjustment of status, even if a petition were to be filed again on his behalf, as he would need a 212(h} waiver. There is no indication of any immigrant visa petition having been filed on the respondent's behalf through which he could seek adjustment of status to lawful resident.

IT IS ORDERED that the respondent be removed to Anguilla on the charge brought against him.

SO ORDERED.

JEFFREY ZLATOW
Immigration Judge

APPENDIX D

8 U.S.C.A. § 1227

United States Code Annotated Currentness

Title 8. Aliens and Nationality (Refs & Annos)

Chapter 12. Immigration and Nationality

Subchapter II. Immigration

Part IV. Inspection, Apprehension, Examination, Exclusion, and Removal (Refs & Annos)

§ 1227. Deportable aliens

(a) Classes of deportable aliens Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub.L. 104-208, Div. C, Title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if—

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years

subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens, described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is an alien who qualifies for classification under clause (iii) or (iv) of section 1154(a)(1)(A) of this title or clause (ii) or (iii) of section 1154(a)(1)(B) of this title.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal

based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full

and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title, is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term

"protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of Title 18 (relating to fraud and misuse of visas, permits, and other admission documents), is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no

previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in—

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is deportable.

(B) Terrorist activities

Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 1182(a)(3)(B)(iv) of this title) is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Recipient of military-type training [FN2]

(i) In general

Any alien who has received military-type training from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in subclause (I) or (II) of section 1182(a)(3)(B)(vi) of this title), is deportable.

(ii) Definition

As used in this subparagraph, the term "military-type training" includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm, or other weapon, including any weapon of mass destruction (as defined in section 2332a(c)(2) of Title 18).

(E) Participated in the Commission of severe violations of religious freedom [FN2]

Any alien described in section 212(a)(2)(G) is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

(A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

(B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

(7) Waiver for victims of domestic violence

(A) In general

The Attorney General is not limited by the criminal court record and may waive the application of paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship—

(i) upon a determination that--

(I) the alien was acting is [FN1] self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime—

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

(b) Deportation of certain nonimmigrants

An alien, admitted as a nonimmigrant under the provisions of either section 1101(a)(15)(A)(i) or 1101(a)(15)(G)(i) of this title, and who fails to maintain a status under either of those provisions, shall not be required to depart from the United States without the approval of the Secretary of State,

unless such alien is subject to deportation under paragraph (4) of subsection (a) of this section.

(c) Waiver of grounds for deportation

Paragraphs (1)(A), (1)(B), (1)(C), (1)(D), and (3)(A) of subsection (a) of this section (other than so much of paragraph (1) as relates to a ground of inadmissibility described in paragraph (2) or (3) of section 1182(a) of this title) shall not apply to a special immigrant described in section 1101(a)(27)(J) of this title based upon circumstances that existed before the date the alien was provided such special immigrant status.

APPENDIX E

Cal Rev & Tax Code § 19406 (1993)

§ 19406. Punishment for willful failure to file return or willfully making false return

Any person who, within the time required by or under the provisions of this part, willfully fails to file any return or to supply any information with intent to evade any tax imposed by this part, or who, willfully and with like intent, makes, renders, signs, or verifies any false or fraudulent return or statement or supplies any false or fraudulent information, is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars ($20,000), or by both such fine and imprisonment, at the discretion of the court.

Supreme Court, U.S.
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No. 04-1575

In the Supreme Court of the United States

THEOPHILE CARTY, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether willfully failing to file a return with the intent to evade a tax, in violation of Cal. Rev. & Tax Code § 19406 (West 1992), is a "crime[] involving moral turpitude" under 8 U.S.C. 1227(a)(2)(A)(ii).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 395 F.3d 1081. The decisions of the Board of Immigration Appeals (Pet. App. 12a) and the immigration judge (Pet. App. 13a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2005. A petition for rehearing was denied on April 13, 2005. The petition for a writ of certiorari was filed on May 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native of Anguilla and a citizen of the United Kingdom. He entered the United States in

1965 and became a lawful permanent resident in 1975. In 1996, petitioner was convicted in California court of the felony offense of willfully failing to file state income-tax returns with the intent to evade taxes for the years 1991 and 1992, in violation of Cal. Rev. & Tax Code § 19406 (West 1992).[1] For those crimes, he was sentenced to 90 days of house arrest and three years of probation, and was ordered to make payment of all past taxes due. In 2001, petitioner was convicted in federal court of the felony offense of attempted bribery of a public official, in violation of 18 U.S.C. 201(b)(1). For that crime, he was sentenced to 18 months of imprisonment. Pet. App. 2a, 13a-14a.

2. The Immigration and Naturalization Service[2] thereafter commenced removal proceedings, alleging that petitioner was removable under 8 U.S.C. 1227(a)(2)(A)(ii) as an alien convicted of two or more crimes involving moral turpitude. Pet. App. 2a.[3] The

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[1] Section 19406 provides, in relevant part, that

> [a]ny person who * * * willfully fails to file any return or to supply any information with intent to evade any tax imposed by this part * * * is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars ($20,000), or by both such fine and imprisonment.

[2] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

[3] Section 1227(a)(2)(A)(ii) provides that "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."

immigration judge (IJ) rejected petitioner's contention that the tax offenses were not crimes involving moral turpitude; denied his request for cancellation of removal; and ordered him removed to Anguilla. *Id.* at 13a-24a. The Board of Immigration Appeals (BIA) agreed with the IJ that the tax offenses were crimes involving moral turpitude and dismissed petitioner's appeal. *Id.* at 12a.

3. A divided panel of the court of appeals dismissed petitioner's petition for review. Pet. App. 1a-11a.

a. The court of appeals concluded that the offense of failure to file a return with intent to evade a tax is a crime involving moral turpitude, and that the court therefore lacked jurisdiction over petitioner's challenge to the removal order under 8 U.S.C. 1252(a)(2)(C). Pet. App. 1a-7a.[4] The court explained that there are two types of crimes of moral turpitude, "those involving fraud and those involving grave acts of baseness or depravity," and that an offense "falls within the first category" if intent to defraud is an "essential element" of the offense. *Id.* at 3a-4a (quoting *Goldeshtein* v. *INS*, 8 F.3d 645, 647 (9th Cir. 1993)). The court held that the California offense satisfies that requirement, because "[i]ntent to defraud is implicit in willfully failing to file

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[4] Section 1252(a)(2)(C) provides, in relevant part, that

> no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed * * * any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

Section 1227(a)(2)(A)(i), in turn, provides that an alien convicted of a crime involving moral turpitude within a certain period after the date of admission, and "for which a sentence of one year or longer may be imposed," is deportable.

a tax return with the intent to evade taxes." *Id.* at 4a-5a.

In so holding, the court of appeals reasoned that, unlike a defendant who willfully structures transactions, an offense that has been held not to involve moral turpitude, petitioner did not deprive California of "mere information"; his willful failure to file tax returns was an attempt "to deprive the government of revenue—or, in other words, to obtain a free pass on taxes." Pet. App. 5a (citing *Goldeshtein*, 8 F.3d at 649). The court also observed that the "closest analog" to Section 19406 is 26 U.S.C. 145(b) (Supp. V 1939), which prohibited the willful attempt "in any manner to evade or defeat any tax," and that a violation of Section 145(b) has been held to be a crime involving moral turpitude. Pet. App. 5a (discussing *Tseung Chu* v. *Cornell*, 247 F.2d 929 (9th Cir.), cert. denied, 355 U.S. 892 (1957), and *Chanan Din Khan* v. *Barber*, 253 F.2d 547 (9th Cir.), cert. denied, 357 U.S. 920 (1958)). Finally, the court relied on the fact that "the terms 'evasion' and 'fraud' have been treated interchangeably by California and the federal government." *Id.* at 6a (citing Cal. Rev. & Tax Code § 6485 (West 1998) and 26 U.S.C. 6653(2)).

b. Judge Canby dissented. Pet. App. 8a-11a. He said that he "would be willing to accept" the majority's holding "[a]s a matter of first impression," but that, in his view, the court's precedent "requires a contrary result." *Id.* at 8a. According to the dissent, in holding that violation of Section 145(b) involves moral turpitude, the court in *Tseung Chu* and *Chanan Din Khan* relied, not on "the face of the statute itself" or on "the mere fact of conviction," but on "a specific allegation of fraud" in the charging instrument. *Ibid.* Since there was "no such allegation" here, Judge Canby would have granted

the petition for review and reversed the decision of the BIA. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-8) that the California offense of willfully failing to file a return with intent to evade a tax is not a crime involving moral turpitude. The court of appeals correctly held otherwise, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. As petitioner acknowledges (Pet. 5), "a crime [of] which fraud is an ingredient involves moral turpitude." *Jordan* v. *De George*, 341 U.S. 223, 227 (1951). The definition of fraud is "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Black's Law Dictionary* 685 (8th ed. 2004). Petitioner contends (Pet. 5-6) that his failure to file tax returns does not involve fraud, because one who fails to disclose material information commits fraud only when he has a duty to disclose. But petitioner was under a legal obligation to disclose his income by filing a tax return, and his willful failure to do so, with the intent to evade taxes, thus amounted to fraud. The court of appeals' decision is therefore correct.

2. The decision below is the only one of which we are aware that addresses the question whether the California offense at issue here is a crime involving moral turpitude. It is consistent, however, with decisions of other circuits holding that other tax-evasion offenses involve moral turpitude. See *Wittgenstein* v. *INS*, 124 F.3d 1244, 1246 (10th Cir. 1997) (New Mexico crime of willfully attempting to evade or defeat any tax

or the payment thereof); *Costello* v. *INS*, 311 F.2d 343, 348-349 (2d Cir. 1962) (federal offense of willfully attempting in any manner to evade or defeat any tax), rev'd on other grounds, 376 U.S. 120 (1964).

The sole lower-court authority on which petitioner relies (Pet. 4) is *United States* v. *Carrollo*, 30 F. Supp. 3 (W.D. Mo. 1939). Any conflict between a district court decision and the court of appeals' decision in this case, however, does not provide a basis for certiorari. See Sup. Ct. R. 10. In any event, *Carrollo* rested on the premise that a crime involving moral turpitude must "evidenc[e] baseness, vileness, or depravity of moral character." 30 F. Supp. at 7. This Court's subsequent decision in *De George* rejected that view, 341 U.S. at 226, and held that any crime of which fraud is an "ingredient," *id.* at 227, 232, is a crime involving moral turpitude.

3. Petitioner's principal contention (Pet. 4-7) is that the court of appeals' decision conflicts with *United States* v. *Scharton*, 285 U.S. 518 (1932), which held that the federal offense of attempt to evade taxes was governed by the general three-year limitation period applicable to tax crimes, rather than the special six-year limitation period applicable to tax crimes that involve "defrauding or attempting to defraud" the government (*id.* at 520 n.2) (quoting 18 U.S.C. 585 (Supp. V 1931)). For at least two reasons, the decision in this case is not inconsistent with *Scharton*. First, unlike the federal statute at issue there (see *id.* at 520 n.1), the California statute at issue here requires a willful failure to file a tax return—*i.e.*, a failure to disclose information that the law requires to be disclosed. Second, the decision in *Scharton* was based on interpretive canons that are not relevant here: the canon that "an excepting clause" is to

be "narrowly construed"; and the canon that a provision "ha[ving] to do with statutory crimes" is to be "liberally interpreted in favor of repose." *Id.* at 521-522. The court of appeals thus correctly distinguished *Scharton* on the ground that it involved a "narrow construction applied to statute of limitations issues." Pet. App. 4a n.5. Indeed, even the dissenting judge recognized that "*Scharton*'s result depended in part on a strict standard of construction applicable to the extended limitations provision," and that the decision in that case therefore "does not directly control the outcome of [petitioner's] case." *Id.* at 11a.

Citing this Court's decision in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6 (1948), petitioner also contends (Pet. 7-8) that the court of appeals' decision is inconsistent with the canon of construction prohibiting courts from "assum[ing] that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used" (*Fong*, 333 U.S. at 10). But petitioner does not cite any decision that applies that canon in deciding whether fraud is an "ingredient," *De George*, 341 U.S. at 227, 232, of an offense like the one at issue here, much less a decision that relies on the canon as a basis for reaching the result that petitioner advocates. In any event, even if petitioner is correct that "reading 'evade' to exclude 'defraud' is at least one of 'several possible meanings' of the[] word[]" (Pet. 8), his argument ignores the fact that the statute at issue here requires not only an intent to evade taxes but the willful failure to file a return. That statutory language does not have "several possible meanings."

CONCLUSION

The petition for a writ of certiorari should be denied.

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(3)

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ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

1. The Solicitor General argues that the Panel Majority's decision is consistent with *United States v. Scharton*, 285 U.S. 518 (1932). (Opposition ("Opp.") at 6). According to the Solicitor General, this is so because, "unlike the federal statute at issue there, the California statute at issue here requires a willful failure to file a tax return—*i.e.*, a failure to disclose information that the law requires to be disclosed."

This argument fails, for two reasons. First, the crime at issue in *Scharton* was a "willful[] attempt[]" to evade taxes; here, the crime at issue is "willful failure" to file a tax return with the intent to evade taxes. The Solicitor General does not

explain why this difference is important. Indeed, a "willful failure to file" a tax return could also be a "willful attempt" to evade taxes. Thus, this is a distinction without a difference.

Second, the Panel Majority held that Carty's crime involved fraud because it involved an "intent to evade" taxes, not because it involved the "willful failure to file a return." See, e.g., Appendix A at 1a ("We must decide whether 'intent to evade' is synonymous with 'intent to defraud' within the meaning of the removal provisions of the Immigration and Nationality Act"). The Solicitor General does not explain why the "willful failure to file" language in the California statute has any relevance whatsoever to whether *Scharton* controls this case.

2. The Solicitor General also argues that this Court in *Scharton* read the language at issue narrowly because of interpretive canons that are not at issue here. However, the Solicitor General does not deny that the Panel Majority failed to apply the canon of construction that this Court applied in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), prohibiting courts from "assum[ing] that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." (Opp. 8) The Solicitor General defends that failure on two grounds, neither of which is tenable.

First, the Solicitor General points out that Carty "does not cite any decision that applies that canon in deciding whether fraud is an 'ingredient' . . . of an offense like the one at issue here." (Opp. 8). However, in *Fong*, this Court applied that canon of construction to the words "sentenced more than once," and there is nothing indicating that the canon would not apply equally to other words in that statute, including the words "crime involving moral turpitude."

Second, the Solicitor General argues that the canon does not apply because "the statute at issue here requires not only

an intent to evade taxes but the willful failure to file a return," which "does not have 'several possible meanings.'" For the same reason as above, this misses the issue. The Panel Majority's decision turned solely on the requirement of an "intent to evade" taxes, not because of the language "willful failure to file" a return. Whether or not "willful failure to file" has several meanings is irrelevant.

3. The Solicitor General claims that Petitioner Theophile Carty's crime involves "fraud" as defined in Black's Law Dictionary: "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." (Opposition ("Opp.") at 6) (quoting *Black's Law Dictionary* 685 (8th ed. 2004)). However, the Solicitor General does not even attempt to explain how Carty's crime of willful failure to file tax returns with the intent to evade taxes fits that definition.

Indeed, Carty's crime does not involve "fraud" as so defined. Carty was not accused of misrepresenting the truth, nor was he accused of concealing a material fact. Because Carty's crime does not involve fraud, it is not one of moral turpitude, and his Petition should be granted and the Panel Majority's decision summarily reversed.

4. In addition to failing to explain why Carty's crime allegedly involved fraud as defined in Black's, the Solicitor General also fails to address Carty's argument that his crimes did not involve fraud because they did not involve deceit, which is an element of fraud under California law. Carty's argument thus remains unrebutted.

5. The Solicitor General does not persuasively rebut Carty's argument that his crime did not involve fraud because fraud also requires an act of ***commission***, rather than mere ***omission***, and failure to file returns is an act of omission. Indeed, the Solicitor General does not deny that Carty's failure to file tax returns was an act of omission. However,

citing no precedent whatsoever, the Solicitor General asserts that this amounted to fraud anyway, because Carty "was under a legal obligation to disclose his income by filing a tax return, and his willful failure to do so, with the intent to evade taxes, thus amounted to fraud." (Opp. 5).

Why does the willful failure to perform a legal obligation (file tax returns) with the intent to evade taxes amount to fraud? The Solicitor General supplies no answer. The willful failure to perform a legal obligation with the intent to evade taxes is precisely that, not fraud. The Panel Majority's decision contradicts *Scharton*, in which this Court rejected the contention that "fraud is implicit in the concept of evading."

CONCLUSION

For the foregoing reasons, the Petition should be granted, and the decision below summarily reversed; or the case should be set for plenary briefing and argument on the important questions presented.

Respectfully submitted,

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